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Br. of Bartlett & Anderson for

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Supreme Court of the United States.

OCTOBER TERM, 1901.

119.

ANNIE ANDREWS, PLAINTIFF IN ERROR,

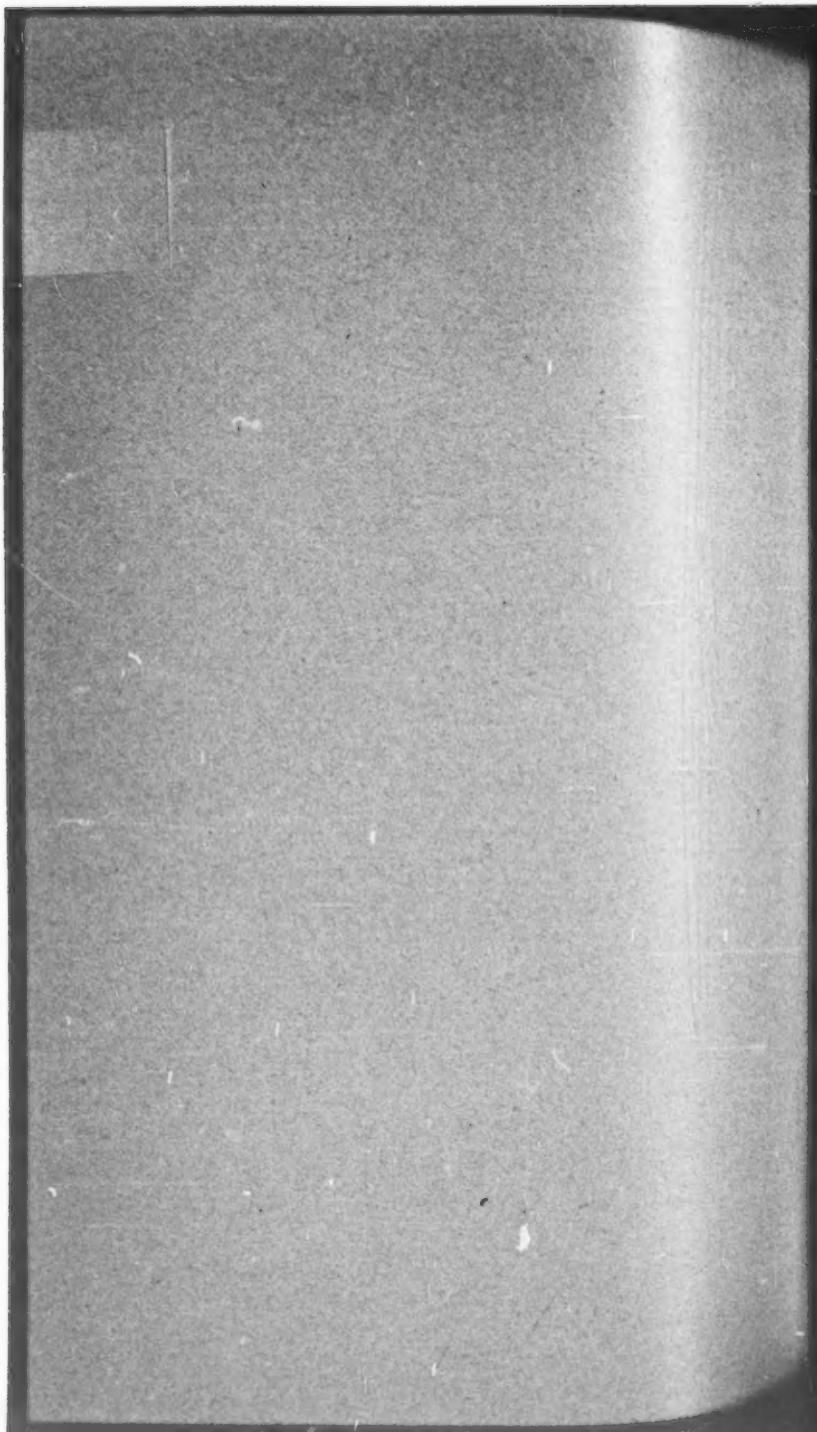
vs.

KATE H. ANDREWS.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.

BRIEF OF PLAINTIFF IN ERROR.

CHARLES W. BARTLETT,
ELBRIDGE R. ANDERSON,
Attorneys for Plaintiff in Error.



Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 119.

ANNIE ANDREWS, *Plaintiff in Error,*
vs.
KATE H. ANDREWS.

STATEMENT OF THE CASE.

This case comes to this Court upon a writ of error sued out by Annie Andrews, of Boston, and directed to the Supreme Judicial Court of the State of Massachusetts. The writ issued on the sixth day of July, 1900, and was allowed by Oliver Wendell Holmes, clerk for the Supreme Judicial Court and Chief Justice of said court (page 1, Record).

The plaintiff in error assigned as error the following: —

First. The Court, in ordering her petition for the administration of the estate of Charles S. Andrews to be dismissed on the ground that she was not the widow of the said Andrews, failed to give full faith and credit, as required by the Constitution and laws of the United States, to the judicial proceedings had in the State of South Dakota, by which said Andrews was divorced from the defendant in error, Kate H. Andrews.

Second. Section 41 of Chapter 146 of the Public Statutes of Massachusetts, as applied to this case, is repugnant to the Constitution and laws of the United States, and the Court upheld said statute.

Annie Andrews filed her petition in the Probate Court for the county of Suffolk and State of Massachusetts upon the fourteenth day of October, 1897, setting forth in said petition that she was the

widow of said Charles S. Andrews, and that there had been born to her and said Charles S. Andrews two children, minors, whose names appear in said petition. She claimed the right to be appointed as such administratrix as such widow. On the fourteenth day of October the Probate Court, by its decree, appointed her as such administratrix (pages 2 and 3, Record). On the fifth day of November, 1897, the defendant in error claimed an appeal to the Supreme Judicial Court for the State of Massachusetts and filed objections to said decree, claiming that she, and not the said Annie Andrews, was the widow of said Charles S. Andrews (pages 3 and 4, Record). On said November fifth, the defendant in error entered her appeal in the Supreme Judicial Court and filed her objections to said decree of the Probate Court appointing the plaintiff in error as such administratrix, in which said objections said defendant in error set out that the statement of the plaintiff in error in her petition for administration to the Probate Court, "that she is the widow of Charles S. Andrews, is not true, as the defendant in error, at the time of the death of the said Charles S. Andrews, was his only lawful wife and is now his widow" (page 4, Record). The plaintiff in error duly appeared, and on the nineteenth day of January, 1899, she filed an answer (pages 4 and 5, Record), in which she denied that the defendant in error is a person interested in the estate of Charles S. Andrews, deceased, and denied that said Kate is the widow of the said Charles S. Andrews, and also that she (the defendant in error) has no right in law to prosecute this appeal, and this court (the Supreme Judicial Court of the State of Massachusetts) had no jurisdiction to entertain, hear or determine the same. Thereafter, a hearing was had on the said appeal upon the issues raised by the pleadings, and on the sixth day of February, 1899, the decree was entered in said court as follows: "Decree of the Probate Court reversed" (page 5, Record). At the hearing in the Supreme Judicial Court, to wit, the trial court, the presiding justice made certain findings of fact and rulings of law which are to be found upon pages 31 to 33 of the Record. The plaintiff in error requested the Court to make certain rulings, which requests for rulings are found on page 31 of the Record. The ruling requested which has to do with the question raised by the writ of error is as follows:

First, that upon all the evidence in the case the appellant has no standing in this court and is not a person interested in the estate of Charles S. Andrews deceased." The presiding justice refused to rule as requested and the plaintiff in error duly excepted, both to the refusal of the presiding justice to rule as requested, and also to the rulings made by the said presiding justice, which were as follows: "That the divorce obtained in South Dakota is, by Public Statutes, Chapter 146, Section 11, of no force or effect in this Commonwealth; that the respondent must be regarded as the lawful wife of the said Charles; that the second marriage is therefore illegal" (page 33, Record). The plaintiff in error duly filed her bill of exceptions in the Supreme Judicial Court for the Commonwealth, which bill of exceptions is to be found upon page 5 of the record. Thereafter, a hearing was had upon the said bill of exceptions, and upon the sixteenth day of May, 1900, the Supreme Judicial Court decided said case so presented, and delivered the opinion of the court by Mr. Chief Justice Holmes (pages 75 to 79, Record). Thereafter, on June 30, 1900, the final decree of said Supreme Judicial Court was entered (page 74, Record). The final decree was as follows: —

"This case came on to be further heard, and now, on consideration thereof, and in pursuance of a rescript from the Supreme Judicial Court for the Commonwealth as appears of record in this cause, it is ordered, adjudged and decreed that the divorce obtained by Charles S. Andrews in South Dakota is of no force and effect in this Commonwealth, and his subsequent marriage with Annie Andrews, appellee, is therefore illegal; that said Kate H. Andrews is the lawful widow, and said Annie Andrews is not entitled as his widow to administer his estate; that the decree of the Probate Court appointing her to be administratrix of his estate be reversed and her petition for administration be dismissed. June 30, 1900."

FACTS.

Nov. 19, 1891, Charles S. Andrews, who had formerly resided in the State of Massachusetts, but who at that time was living in South Dakota, filed a petition for divorce in the proper court of South Dakota, in which he alleged that he had resided in South Dakota for ninety days, the period required by the laws of that State (page 36, Record). His wife, Kate H. Andrews, appeared in those proceed-

ings and filed an answer denying residence and the other facts alleged in the petition. She also in those proceedings petitioned the Court to grant her alimony *pendente lite*, and for an allowance with which to prepare her case for trial and for attorneys' fees. Upon that petition she had a full hearing, and the Court granted her the allowance and counsel fees prayed for, but refused to allow her alimony *pendente lite*, as appears on pages 60 and 61 of the record. Subsequently she withdrew her appearance pursuant to an agreement, under which, and in consideration of the payment of $2050, she "consented to the granting of divorce for desertion in the South Dakota Court" (page 64, Record). May 6, 1892, the South Dakota Court (pages 61 and 62, Record) made certain findings, and among them, that the plaintiff, Charles S. Andrews, "is and was for more than ninety days next preceding the commencement of this action a resident in and of the State of South Dakota in good faith," and entered a decree of divorce. Andrews returned to the State of Massachusetts and on Jan. 11, 1893, married the plaintiff in error, Annie Andrews. The issue of this marriage are two children, still living.

Annie Andrews "at the time of the marriage believed the said Andrews had the right to marry. She had nothing whatever to do with the divorce, and was in no way the alleged or actual cause of the disagreement between the said Charles and the said appellant, and throughout has acted in the utmost good faith. She knew of the divorce, but believed it was legal and had reason so to believe." Upon the hearing in the trial court the presiding judge made certain findings of fact (pages 31–33, Record), the most important of which, in addition to the facts above stated, are as follows: —

"I find that the husband went to South Dakota and took up his residence there to get this divorce, and that he intended to return to this State when the business was finished. He boarded at a hotel in Sioux Falls at the time, and had no other business there than the prosecution of this divorce suit. I find, however, that he voted there at a State election in the fall of 1891, claiming the right to do so as a *bona fide* resident under the laws of that State. His intention was to become a resident of that State for the purpose of getting his divorce, and to that end to do all that was needful to make him such a resident; and I find he became a resident, if, as a matter of law, such finding is warranted in the facts above quoted." (Page 32, Record.)

At the conclusion of his finding, the Court made the ruling hereinbefore set forth.

ARGUMENT.

FIRST.

Jurisdictional Question.

It has been held by this Court that it has the authority to review the final decisions and judgment of a State court in cases where there has been drawn in question a statute or authority exercised under the State upon the ground of repugnance to the Constitution, or a law, or treaty of the United States, when the decision has been in favor of the validity of the State law or authority in question, and also in a case where a right has been claimed under the Constitution or law of the United States and the decision has been against the right so claimed.

Home Insurance Co. *v.* City Council of Augusta, 93 U. S. 116.

First. The decree of the Massachusetts Court dismissing the petition for administration of the plaintiff in error on the ground that she was not the widow of Charles S. Andrews was final and conclusive upon the question of her widowhood, and her rights in the property of her husband, Charles S. Andrews. After the dismissal of that petition she could never again assert her right to the property of Charles S. Andrews as his widow.

Under the laws of the State of Massachusetts, Chapter 130, Public Statutes, Section 1, provides, that administration of the estate of an intestate shall be granted to one or more of the persons hereinafter mentioned and they shall be entitled thereto as follows: "The widow of the deceased or his next of kin, or the widow jointly with the next of kin, as the Probate Court may deem fit."

The direct issue raised by the petition for administration was the widowhood of the petitioner. By the final decree of the Supreme Judicial Court, after rescript from the Supreme Judicial Court for the Commonwealth, the question of her widowhood was forever settled and the status of the children born of the marriage was fixed, and so long as said final decree remains in force she is adjudged to be no widow. Her petition was dismissed out of the court, and was finally disposed of.

Second. The final decision and judgment of this case was based upon Chapter 146, Sect. 41, Public Statutes of Massachusetts, the validity of which was drawn in question upon the ground of its repugnance to the Constitution and laws of the United States in so far as it applied to the facts in this case, and the decision of the Court was in favor of the validity of that statute. It was claimed that as applied to the facts in this case that statute was repugnant to the Constitution of the United States, in that in following the said statute the Court was compelled to declare the divorce obtained in the State of South Dakota, after judicial proceedings had been taken in the State of South Dakota and a decree for divorce granted, void and of non effect in this Commonwealth; and in so doing that the Court must fail to give full faith and credit to the proceedings and conclusions of the South Dakota Court, which is repugnant to the United States Constitution, Article 4, Sect. 1, and the United States Revised Statutes, Sect. 905.

There can be no doubt that the question in regard to the statute was duly raised and at the proper time. The plaintiff in error relied on the Dakota divorce to make out her claim of widowhood (pages 5–21, Record). The plaintiff in error raised the question and brought it to the attention of the trial court, in requesting the Court to rule that upon all the evidence in the case the appellant was not a person interested in the estate of Charles S. Andrews (page 31, Record). The trial court in the original hearing held the statute to be valid and the Dakota divorce of non effect in this Commonwealth, and that the defendant in error was the lawful wife of the said Andrews, and that the marriage to the plaintiff in error was illegal (page 33, Record). The Supreme Judicial Court for the Commonwealth upheld the statute, and declared in its opinion (page 77, Record) that as applied to this case "it does not go beyond the constitutional powers of the State"; and again, "the Commonwealth having intervened by legislation, the appellant gets the benefit of it irrespective of any merits of her own." Again, "it is settled that in a case within the statute, the divorce is to be treated here as void for all purposes."

Third. In this case the plaintiff in error claimed a right under the Constitution and laws of the United States and the decision of

e Supreme Judicial Court for the Commonwealth, and the final ecree of said Court denied her the right which she claimed. The ght claimed by the plaintiff in error was the right under the Con- itution of the United States, Article 4, Section 1, that full faith and redit should be given in the State of Massachusetts to the judicial roceedings and decree of the State of South Dakota by which a ivorce was granted to Charles S. Andrews from the defendant in rror, and the decision and final decree in the said cause was against ne said right so claimed.

If the Court, from an inspection of the record, should say that he federal question was not directly in terms raised by the rulings equested, then the plaintiff in error claims that it does appear rom the record by clear and necessary intentment that the federal uestion was directly involved, so that the State court could not have iven judgment without deciding it.

Powell *v.* New Brunswick County, 150 U. S. 433.

There were only two questions raised by the bill of exceptions in he original case, and there were only two questions which were assed upon by the Supreme Judicial Court for the Commonwealth. One was the constitutional question, the other was a question of estoppel (page 31, Record). The Supreme Judicial Court for the Commonwealth, in its opinion (page 78, Record), holds that there was no estoppel. That disposes of that question (excepting so far as the question of estoppel is involved in the constitutional question) against the plaintiff in error in this court, and left the case simply upon the question of widowhood as affected by the South Dakota divorce. The South Dakota divorce, and all of the proceedings connected therewith, was a part of the bill of exceptions from the trial court to the Supreme Judicial Court for the Commonwealth, and it appears from the record that Charles S. Andrews was married at one time to the defendant in error; that after that marriage the proceedings were had in the State of South Dakota and the divorce granted; and thereafter the said Charles S. Andrews was married to Annie Andrews, the plaintiff in error. Annie Andrews claimed to be the widow of Charles S. Andrews, and relied upon the South Dakota divorce upon that question. The defendant in error denied the

widowhood, and relied upon the statutes of Massachusetts relating to divorce as rendering null and void that divorce obtained in the State of South Dakota.

Of necessity, the validity of the proceedings in South Dakota were directly in question, and the constitutionality of the Massachusetts statute was also in question, and in order to finally dispose of the said cause the Supreme Judicial Court for the Commonwealth was compelled to dispose of the question of the validity of the divorce in South Dakota and to dispose of the question of the validity of the Massachusetts statute as affecting that divorce, and to dispose of the question as to whether that statute was repugnant to the Constitution of the United States, Article 4, Section 1. Without the decision of the constitutional question, the South Dakota divorce could not be disposed of. That this statement is true, and that the South Dakota divorce was declared null and void on account of the statute, which was declared to be valid, as applied to this case, the record discloses, in the ruling of the trial court (page 33, Record), that the trial court bases its decision and decree upon the fact as found by it and the law as ruled by it, that the divorce obtained in South Dakota is, by Pub. Stats., Chap. 146, Sect. 41, of no force or effect in this Commonwealth, and, in the opinion of the Supreme Judicial Court for the Commonwealth (page 77, Record), "it (the statute) does not go beyond the constitutional powers of the State" (page 78, Record); "the Commonwealth having intervened by legislation the appellant gets the benefit of it, irrespective of any merits of her own."

"The questions are whether the divorce is valid in this State (Massachusetts), or whether, if it is invalid, the appellant, on the ground of connivance and acquiescence, is estopped to deny its validity." (Opinion of Holmes, C. J., page 75, Record.)

On page 78 of the record, the Court disposes of the question of estoppel against the plaintiff in error in a few lines, and all of the opinion, other than those few lines, is devoted to the question, "whether the divorce is valid in this State," and the foundation of the question is the statute of Massachusetts. (Pub. Stats., Chap. 146, Sect. 41.)

The decree following the rescript of the Supreme Judicial Court

on its decision of the case, as shown in its opinion, is based upon the constitutional question and that alone.

Fourth. It is not necessary that the federal question appear affirmatively upon the record or in the opinion if the adjudication of such a question is involved in the disposition of the case by the State court.

Kaukauna Co. *v.* Green Bay, etc., 142 U. S. 254.
Willson *v.* Blackbird Creek Marsh Co., 2 Peters, 245.
Armstrong *v.* Athens Co., 16 Peters, 281.
Chicago Life Ins. Co. *v.* Needles, 113 U. S. 574.
Eureka Lock Co. *v.* Yuba Co., 116 U. S. 410.

Fifth. In this case the fact that the Court, neither in the decree or the opinion, mentions the questions or the claim that full faith and credit should be given to the judicial proceedings and findings of the South Dakota Court in terms cannot affect the jurisdiction of this Court, for the plaintiff in error claims that the record fairly presents a federal question and claims that its decision was necessary to the determination of the case.

Chapman *v.* Goodnow's Adm., 123 U. S. 540.

The Court there said: "If a federal question is fairly presented by the record and its decision is actually necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is as much against the right, within the meaning of Section 709, Revised Statutes, as if it had been specifically referred to and the right directly refused."

This Court has also decided that when judgment necessarily involves an adjudication of the claim that a statute of the State is in derogation of the rights secured by the United States Constitution, the court has jurisdiction.

Chicago Life Ins. Co. *v.* Needles, 113 U. S. 574.

SECOND.

Argument of Constitutional Question.

Both parties submitted to the jurisdiction of the South Dakota court. No fraud was practised upon the court. Under the Constitution of the United States the judgment of divorce is conclusive. It appears that the State court felt constrained to sustain the appeal because of Pub. Stats. of Masachusetts, Chap. 146, Sect. 41, which provides that, "when an inhabitant of this Commonwealth goes into another state or country to obtain a divorce for a cause which occurred here while the parties resided here, . . . a divorce so obtained shall be of no force or effect in this Commonwealth." It is important, therefore, to consider the validity and scope of this statute.

"Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State, and the Congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

United States Constitution, Article 4, Section 1.

"And the said records and judicial proceedings so authenticated shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken."

United States Revised Statutes, Section 905.

It is clear that such judgments as are protected by this constitutional provision cannot be nullified by any State law, and that, upon the question what judgments are so protected, the decisions of the United States Supreme Court, so far as they go, are controlling.

Christmas *v.* Russell, 5 Wall. 290.

Laing *v.* Rigney, 160 U. S. 531.

It is now settled that a judgment in a personal action is of no validity unless the Court has jurisdiction of the defendant by service or by appearance, and even in divorce matters a radical distinction is made between *ex parte* judgments and judgments rendered in the presence of both parties.

On the one hand there is a plain intimation that an *ex parte* judgment of divorce is not conclusive beyond the State in which it is rendered, and that every other State is at liberty to give it such effect as may seem proper as a matter of comity or public policy.

Pennoyer *v.* Neff, 95 U. S. 714, 731, 734.

At page 731 the Court says: —

"The tribunals of one State have no jurisdiction over persons beyond its limits, and can inquire only into their obligations to its citizens when exercising its conceded jurisdiction over their property within its limits."

On page 734 the Court says: —

"To prevent any misapplication of the views expressed in this opinion, it is proper to observe that we do not mean to assert by anything we have said that a State may not authorize proceedings to determine the status of one of its citizens toward a non-resident, which would be binding within the State though made without service of process or personal notice to the non-resident."

"On the other hand it is settled that where the appellant has resided in the State for the period required by the local laws and the defendant is before the Court, a judgment of divorce is conclusive everywhere."

Cheever *v.* Wilson, 9 Wall. 108.

This is apparently the latest decision of the United States Supreme Court upon the extra-territorial effect of a divorce judgment where the defendant is before the Court.

It is important to see, therefore, just where that case leaves us. Mrs. Cheever, formerly of Washington, D. C., brought suit for divorce in Indiana. Her husband, residing in Washington, appeared. The Court decreed a divorce, gave the custody of certain children to Cheever, and ordered Mrs. Cheever to give him a power of attorney to collect certain rents in Washington for the maintenance of the children. Subsequently, Cheever brought suit against the wife and one Wilson to enforce specific performance of the order as to the rents. Wilson contended that the Indiana divorce was void because Mrs. Cheever was not a resident of that State. Upon this question the views of the Supreme Court are shown from the following extracts from the opinion.

Swayne, J., page 122: —

"The petition for divorce makes a case within the statute. It alleges that the petitioner was a *bona fide* resident of the county where it was filed. . . . The petition laid the proper foundation for the subsequent proceedings. It warranted the exercise of the authority which was invoked. . . . The Court was the proper one before which to bring the case. It had jurisdiction of the parties and the subject-matter. The decree was valid and effectual according to the law and the adjudications in Indiana. The Constitution and laws of the United States gave the decree the same effect elsewhere which it had in Indiana. If a judgment is conclusive in a State where it is rendered it is equally conclusive everywhere in the Courts of the United States."

"It is said the petitioner went to Indiana to procure the divorce, and that she never resided there. The only question is as to the reality of her new residence and of the change of domicile. That she did reside in the county where the petition was filed is expressly found by the decree. Whether this finding is conclusive or only *prima facie* sufficient is a point on which the authorities are not in harmony. We do not deem it necessary to express an opinion on that point. The finding is clearly sufficient until overcome by adverse testimony."

Under this decision, if Andrews was in fact a resident of South Dakota when he applied for his divorce, then the judgment is conclusive. If he was not a resident, then the question as to whether the judgment is open to attack upon that ground is left undecided.

First. The appellee contends that Andrews was a resident of South Dakota at the time he applied for his divorce.

"He became a resident if, as a matter of law, such finding is warranted on the facts above stated." (Finding of Judge Hammond, Record, page 32.)

Do the special facts found by the judge make it impossible as a matter of law that Andrews should have been a resident of South Dakota?

The fact that he went there for the purpose of obtaining a divorce is not conclusive.

A man may move from one town to another for the avowed purpose of escaping taxation, but his change of residence depends not upon his motive, but upon his intent. "The wish to change for that

purpose does not show the want of real intention to change, but rather to the contrary."

Thayer *v.* Boston, 124 Mass. 132, 148.

The fact that Andrews "intended to return to this State when the business was finished" is not conclusive.

Many families take up their residence in a college town when their sons enter college, intending to remove therefrom when the college course is finished. This intention is not inconsistent with an actual residence in a college town.

Methodist clergymen are required by the rules of their denomination to change from place to place every two or three years, but these rules do not prevent the clergyman from obtaining a residence and a right to vote in every place in which he resides.

Holmes *v.* Green, 7 Gray, 299.
Carnoe *v.* Inhabitants of Freetown, 9 Gray, 357.
Sleeper *v.* Page, 15 Gray, 349, 350.

In Holmes *v.* Green, the plaintiff removed from Fall River to Tiverton, May 6, 1853, and returned in June, 1854. When he left Fall River he declared that he intended to retain his domicile in Fall River, and that he was leaving for a temporary purpose. Held, nevertheless, that he had changed his domicile.

Bigelow, J.: "No case can be found where a domicile of a party has been made to depend on the bald intent, unaided by any other proof."

In Sleeper *v.* Page, 15 Gray, 349, 350, the Court said: "If his residence out of the Commonwealth was but temporary, yet if the time of his proposed return was indefinite, he retained no domicile in the Commonwealth."

Second. The appellee contends, in the second place, that the finding of the South Dakota court that the libellant (Andrews) was a resident of that State is conclusive in the absence of fraud. The defendant was before the Court; it was open to her to try that question there; she cannot try it in Massachusetts or here.

"In every proceeding of a judicial nature there are one or more facts which are strictly jurisdictional, the existence of which is necessary to the validity of the proceedings, and without which the act of the Court is a mere nullity; such, for example, as the service of process within the State upon the defendant in a common law action. There is, however, another class of facts which are termed quasi jurisdictional, which are necessary to be alleged and proved in order to set the machinery of law in motion, but which, when properly alleged and established to the satisfaction of the Court, cannot be attacked collaterally. Examples of these are the allegations and proofs of the requisite diversity of citizenship and the amount in controversy in a federal court."

Brown, J., in Noble *v.* Union River Logging Railroad, 147 U. S. 165.

Within the distinction here indicated the fact of the residence of the libellant in a divorce suit in which a defendant appears is quasi jurisdictional. By the great preponderance of authority, the findings of the Court upon this question are held to conclude the parties to the proceeding in the absence of fraud.

Ellis' Estate, 55 Minn. 401.
Kinnier *v.* Kinnier, 45 N. Y. 535.
Jones *v* Jones, 108 N. Y. 415.
Kirrigan *v.* Kirrigan, 15 N. J. Eq. 147.
Fairchild *v.* Fairchild, 53 N. J. Eq. 678 (1895).
Waldo *v.* Waldo, 52 Mich. 94 (1883).
Van Fleet Collateral Attack, Section 648 (1892).

Fairchild *v.* Fairchild fully covers the case at bar. Mrs. Fairchild filed in New Jersey a petition against her husband for maintenance. Fairchild set up a judgment for divorce obtained by him in Kansas. The court below found as a fact that he had abandoned the respondent without justifiable cause, that he was not a *bona fide* resident of the State of Kansas, but that he went there solely for the purpose of instituting divorce proceedings, and granted the petitioner the relief asked for. The husband appealed to the Court of Errors and Appeals, and the judgment was reversed upon grounds which appear in the following extracts from the opinion: —

Gummere, J., page 680: "The Court had jurisdiction over the parties, the respondent having voluntarily appeared and made

defence to the action brought against her there by the appellant. The question of the *bona fide* residence of the appellant in Kansas, which was passed upon by the Court of Chancery, was one for the exclusive consideration of the Kansas court. By the statute of that State the plaintiff in an action of divorce is required to have been an actual resident in good faith of the State for one year next preceding the filing of his petition. It was therefore necessary for the Kansas court, before taking up the consideration of the appellant's case upon the merits, to determine whether he had been an actual resident of that State in good faith for at least a year next preceding the commencement of the action, and that decision, unless procured by fraud, is conclusive, not only in Kansas, but in every other jurisdiction where the validity of the judgment comes in question. Can this judgment rendered by a court which had jurisdiction over the parties, and over the subject-matter of the litigation, be ignored by the courts of this State, notwithstanding the prescription of the Constitution of the United States, supplemented by the federal statute of 1790, that the judicial proceedings of each State shall have the same faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State where such proceedings are had? It seems to me not; for while this constitutional provision and the federal statute referred to have been the subject of more or less diversity of opinion, it is now entirely settled that the only grounds upon which the judgment of a court of general jurisdiction can be disregarded in another State are: first, where the adjudging tribunal had no jurisdiction over the person against whom the judgment was pronounced, or over the subject-matter of the litigation; and, second, where the adjudication of the foreign tribunal was obtained by fraud."

In Jones *v.* Jones, 108 N. Y. 415, it appeared that the wife went from New York to Texas and after she had been there six months filed a petition for divorce against her husband. Her husband appeared denying the jurisdiction of the Court, and the question of her actual residence in Texas was tried by the jury and determined in her favor. Subsequently the husband brought suit for divorce in New York. The single question argued by counsel and considered by the Court was whether Jones, by appearing under protest as he

did, had submitted himself to the jurisdiction of the Texas Court. It was assumed on all hands that if he had so submitted himself the question of the wife's residence in Texas could not be tried again in New York.

The conclusive effect given by the New York Courts to judgments of divorce rendered in the presence of both parties is the more noteworthy from the fact that it is still held in New York that *ex parte* judgments of divorce obtained in other States are of no validity in New York whether the libellant was or was not a resident of the State where the divorce was obtained.

People *v.* Baker, 76 N. Y. 78.
O'Dea *v.* O'Dea, 101 N. Y. 23.

Waldo *v.* Waldo, 52 Mich. 94, sustains our contention fully and controls everything to the contrary in

People *v.* Dawell, 25 Mich. 247.

It does not appear that there is any statute in New York or New Jersey declaring that a divorce obtained in another State under certain circumstances shall be void. But the New York and New Jersey decisions seem to rest upon the controlling force of the United States Constitution, and a judgment which is protected by that instrument is as safe from legislative as from judicial attack.

If we are right in assuming that under the decisions the Federal Constitution does not give extra-territorial effect to an *ex parte* judgment of divorce, then the validity of the Massachusetts statute so far as it affects such divorce cannot be questioned, and the decisions of this court concerning such divorces may be put on one side. We find only two cases in which a judgment of divorce obtained in another State, the defendant appearing, has been held void in Massachusetts.

Chase *v.* Chase, 6 Gray, 157.
Hardy *v.* Smith, 136 Mass. 328.

In Chase *v.* Chase no reference was made to the Federal Constitution and it seems impossible to reconcile the decision with Cheever *v.* Wilson, 9 Wall. 108.

In Hardy *v.* Smith the wife obtained a decree of divorce from a

Utah Court pursuant to an agreement with her husband under which he fabricated the evidence by which she sustained her libel. After her death he was permitted to maintain his right as husband in her property notwithstanding the divorce.

This decision is not inconsistent with any position we have taken or need to take in the present case, since it cannot be contended, in the face of Mr. Justice Hammond's findings, that Andrews perpetrated any fraud upon the South Dakota Court. "His intention was to become a resident of that State for the purpose of getting his divorce, and to that end to do all that was needful to make him such a resident, and I find he became a resident if, as a matter of law, such finding is warranted on the facts above stated." (Page 32, Record.)

It is to be noticed that while fraud is suggested in the New Jersey cases as a ground for collateral attack, the fraud referred to means fraud upon one of the parties to the suit. Collusion, unless it involves an agreement to commit perjury or some other illegal act, is not treated either there or in any other jurisdiction as a ground for attack, but rather a ground for estoppel.

THIRD.

Since the courts of each State are required to give to the judgments of other States the faith and credit which are given by law or usage to domestic judgments, it is pertinent to inquire whether any court would permit a domestic judgment to be impeached by one of the parties thereto in a case like the present.

It can be stated, we submit, as a universal proposition that the judgment of a court which has the power to enter judgment upon the facts alleged is binding upon the parties before it, and that this proposition is true of divorce judgments as of other judgments.

"If both parties colluded in a cheat upon the court it was never known that either of them could vacate the judgment."

Willes, C. J., in Prudam *v.* Phillips, Hargraves' Law Tracts, 456,

a case involving the validity of a judgment of nullity.

The above sentence was quoted with approval by Shaw, C. J., in

Greene *v.* Greene, 2 Gray, 361, 362,

and was reaffirmed by Mr. Justice Holmes in

Adams *v.* Adams, 154 Mass. 290, 297.

The effect of the decision in Greene *v.* Greene is thus stated in a later Massachusetts case: —

"Strictly speaking, the decision is an authority only for the proposition that a decree of divorce cannot be called in question or invalidated on the ground of fraud in its procurement in a separate and independent libel subsequently brought between the same parties when it appears that the first decree was entered after due notice to the divorced party followed by an adjudication upon the evidence offered in support of the allegations of the libel. To this extent there can be no doubt that the decision is in harmony with sound principle and with adjudicated cases."

Edson *v.* Edson, 108 Mass. 590, 598.

Shaw, C. J., in Greene *v.* Greene, 2 Gray, 365, refers to the Duchess of Kingston's case, 20 Howell's State Trials, 355, as holding that a decree of nullity of marriage "in a court of competent jurisdiction was conclusive between the parties, but not so in a suit between other parties, and that on an indictment it was competent for the Crown to avoid the effect of the decree in question by proving that it was obtained by the collusion of both parties and a fraud upon the court."

The precise distinction made in the Duchess of Kingston's case between the right of the State and the right of the parties has been followed in Michigan and Minnesota. In both of these States it was held on an indictment for adultery that a divorce obtained in the State in which neither party resided, although the parties had submitted to the jurisdiction, was no defence.

People *v.* Dawell, 25 Mich. 247.
State *v.* Armington, 25 Minn. 29.

But in later cases these courts have held that a divorce obtained under the same circumstances was not open to attack by either party.

Waldo *v.* Waldo, 52 Mich. 94.
Ellis' Estate, 55 Minn. 401.

In Ellis' Estate, the wife having obtained a divorce from her husband, was held precluded from claiming rights as his widow. Her contention was that the divorce was void because neither party lived in the State where the divorce was granted.

Gilfillan, C. J. (p. 411), said: —

"In an action for divorce, the *res* upon which the judgment operates is the status of the parties. There are three parties interested in that, the husband, the wife and the State of their residence."

The Judge, after referring to People *v.* Dawell, 25 Mich. 247, and Waldo *v.* Waldo, 52 Mich. 94, continued: —

"We may from both cases take the rule to be that while the State cannot be bound by its resident citizens appearing in and consenting to the jurisdiction of the Court in another State in an action of divorce, the parties may so bind themselves in respect to their individual interests."

In support of our general proposition that a party who assents to a divorce judgment is bound by it, we submit herewith a number of authorities. In most of the cases cited, the ground of attack was want of jurisdiction. In some, collusion and fraud upon the Court. In some cases the party making the attack was the original libellant, and in others the libellee, who either agreed to the divorce judgment at the time, or subsequently acquiesced in it by marrying or by permitting the libellant to marry without objection.

Cases in which a woman has renounced her status as wife, and has later tried to assert her status as widow, are not infrequent, but the unanimity with which the Court has discouraged this form of enterprise is impressive.

Nichols *v.* Nichols, 25 N. J. Eq. 60.

Wife seeking divorce attacks divorce obtained by husband on grounds of collusion and non-jurisdiction. Wife appeared. After divorce husband married again. Wife made no move for four years.

Zoellner *v.* Zoellner, 46 Mich. 511.

Plaintiff seeks to set aside husband's *ex parte* divorce after husband's death. Husband without objection from plaintiff had married again after divorce.

Richardson's Estate, 132 Pa. St. 292.

Plaintiff claiming widow's right attacks *ex parte* divorce obtained by her husband on jurisdictional grounds. After divorce both husband and wife had married.

Arthur *v.* Israel, 15 Col. 147.

Plaintiff claiming widow's right attacks *ex parte* divorce obtained by husband on jurisdictional grounds. After divorce plaintiff had married.

Mohler *v.* Shank, 93 Iowa, 273.

Plaintiff claiming widow's right attacks divorce obtained by husband on jurisdictional grounds. She had accepted alimony and married again.

Marvin *v.* Foster, 61 Minn. 154.

Husband's grantee seeking partition of deceased wife's lands attacks divorce obtained by wife on jurisdictional grounds. Husband on hearing of divorce had married again.

Stephens *v.* Stephens, 51 Ind. 542.

Plaintiff having married after judgment of divorce obtained by wife appeals from judgment.

Nicholson *v.* Nicholson, 113 Ind. 131.

Wife seeks to set aside divorce of husband on ground of fraud. She made no move until husband married again.

Davis *v.* Davis, 61 Me. 395.

Wife seeks statutory dower after divorce. Husband objects that divorce was obtained by collusion and fraud on the court.

Miltimore *v.* Miltimore, 40 Pa. St. 151.

Plaintiff claiming widow's right alleges that divorce obtained by her was collusive and fraudulent.

In the matter of Morrison, 52 Hun. 102. Affirmed 117 N. Y. 638.

Husband after obtaining *ex parte* divorce claimed rights in deceased wife's property.

Ellis *v.* White, 61 Iowa, 644.

Plaintiff claiming widow's right attacks divorce obtained by herself on jurisdictional grounds.

Elliott *v.* Wohlfrom, 55 Cal. 384.

Husband's grantee attacks *ex parte* divorce obtained by him on jurisdictional grounds.

In Nichols *v.* Nichols, 25 N. J. Eq. 60, the Court said: —

"In Singer *v.* Singer, 41 Barbour, 139, on motion to set aside a decree of divorce for collusion, the Court said where the judgment of divorce has been acquiesced in for a period of several years and the plaintiff has again been married, some better reason than the mere gratification of personal feeling or the desire to obtain a further sum of money from the plaintiff should be made clearly to appear before the Court would be warranted in granting such an application. The ground on which such an order would be made would be one of public policy, but no such reason should suffice where after the acquiescence of both the parties in a judgment for three years an innocent person has been involved by marriage and the opening of the judgment would involve her in distress and perhaps disgrace. This reason would alone be sufficient to justify me in denying the motion if there were no other reason for doing so, and leaving the parties to the consequences of their own acts and agreements after a long delay has taken place. Here is a long delay wholly unexplained. The object of this bill is obviously merely alimony. Public policy does not require the intervention of the Court between these parties. It rather forbids."

In the foregoing cases the original divorce judgment was attacked in some instances on jurisdictional grounds and in others on non-jurisdictional grounds of fraud and collusion, and where the parties have submitted to the jurisdiction of the court there is no valid ground of distinction between the two cases.

If there is any ground for holding that the parties to a divorce judgment are not bound by it, that must be because the State is interested to uphold the marriage relation even against the will of both parties. But if that is the true ground, then it is clear that it can make no difference whether the fraud practised upon the court is a jurisdictional fraud or some other kind of fraud. Suppose, for example, a resident of Massachusetts whose wife has deserted him for one year wishes to obtain a divorce. His wife is willing that he

should. He goes into court after proper service and swears that hi wife has deserted him for three years. His wife does not contes and the divorce is granted. Clearly the wife is bound by thi decree. If thereafter it were open to the wife to attack this divorc when some change in the fortunes of her husband made it he interest to do so, a large proportion of the uncontested divorce granted annually in Massachusetts and other States would be put i peril. Now, suppose that this same man, not being willing to l about the length of the desertion, went to South Dakota whe desertion for one year is a cause, and there told the truth about th desertion but lied about his residence. Upon what ground of publ policy shall it be held that the decree should be open to attack i the one case but not in the other?

No State court would allow a divorce decree of its own tribunal rendered in the presence of both parties, to be attacked upon th jurisdictional question or upon any other. If this be true we subm that the Constitution of the United States protects under the sam circumstances the decrees of other States.

FOURTH.

Recent Cases.

The recent cases decided by this Court in no way change the la as it heretofore existed, but are declaratory of the principles co tended for in this brief.

Bell *v.* Bell, Supreme Court Reporter, Vol. 21, 552.
Streitwolf *v.* Streitwolf, Supreme Court Reporter, Vol. 21, 55

In both these cases the decree of divorce sought to be set up w obtained in cases where there was no appearance by the responden and the proceedings were *ex parte*.

The case of Atherton *v.* Atherton, Supreme Court Reporter, Vo 21, 544, in no way applies to a case like the case at bar and in n way affects the principles contended for in this brief.

ANNIE ANDREWS,
Plaintiff in Error.

Charles W. Bartlett,
Elbridge R. Anderson,
of Counsel.